IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 179

THE PENNSYLVANIA RAILROAD COMPANY,

Appellant,

vs.

BOROUGH OF SAYREVILLE, *et al.*,

Appellees.

ON APPEAL FROM JUDGMENT OF THE SUPREME COURT OF NEW JERSEY

MOTION TO AFFIRM THE JUDGMENT OF THE SUPREME COURT OF NEW JERSEY

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Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8011-12

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Motion to Affirm

Pursuant to Rule 16, par. 1(c), of the Revised Rules of this Court the Appellees move that the judgment of the New Jersey Supreme Court be affirmed on the ground that the questions raised by the appellant are so insubstantial as not to warrant further argument.

Statement of the Case

The Borough of Sayreville, the City of South Amboy, and the County of Middlesex petitioned the New Jersey Board of Public Utility Commissioners for an order directing the Pennsylvania Railroad Company to construct a new fireproof bridge in place of the existing "Deep Cut Bridge"

which carries Washington Road over the tracks of the Pennsylvania Railroad in the Borough of Sayreville. After a hearing, the Board directed the Railroad to reconstruct the Deep Cut Bridge so as to provide a modern fireproof structure capable of carrying modern highway loads (JS 32a, JS 37a). The Railroad accepted the order that required it to reconstruct the bridge but appealed to the Superior Court of New Jersey, Appellate Division, on the ground that the Railroad was entitled by law to have the State of New Jersey contribute 85% of the cost of the new structure. The Appellate Division rejected this contention and affirmed the order of the Board (JS 26a). The Railroad then appealed to the Supreme Court of New Jersey which affirmed the judgment of the Appellate Division (JS 1a). The appeal to this Court was taken from the New Jersey Supreme Court as of right under the provisions of 28 U.S.C. 1257(2).

The story begins well before the Revolutionary War with the Old Burlington Road, a back-country route used by early settlers of Central New Jersey. The portion of this road involved here was rededicated in the early nineteenth century as Washington Road, the name by which it is known today. Although the precise date when the first Deep Cut Bridge was built is unknown it was presumably around 1831 when the railroad was constructed. The bridge was needed to cross the "deep cut" dug under Washington Road so that the trains could avoid the inconvenience and danger of a highway crossing at grade. Washington Road was originally straight at the bridge location but its alignment was sharply curved around the time that the railroad and the first Deep Cut Bridge were constructed. In 1901 the Railroad built a new Deep Cut Bridge which is in use at the present time.

There have been many changes in the surrounding area since 1901. Today three county highways converge on the

Deep Cut Bridge. Washington Road, one of them, now is the principal connecting link between South Amboy and Sayreville and has a dedicated width of 49½ feet which narrows to about 18 feet for the bridge. Sayreville, with 19,000 people, has almost doubled its population since 1950. South Amboy contains 10,000 people. Reliable estimates predict that the Middlesex County population as a whole will double in the next twenty years. In recent years industrial activity has doubled and many large factories are located in Sayreville. Estimates of the amount of cars that use the bridge vary from approximately 1,300 to 3,000 daily.

The bridge that met the needs of 1901 will not permit two buses to pass abreast today. Modern standards require a two-lane bridge to be twenty-six feet wide in contrast to the 17 feet 11 inches clearance of the Deep Cut Bridge. There have been minor accidents as a result of the narrowness and fire engines are not permitted to cross the bridge. Its metal sides obstruct the view of people approaching it. It simply cannot handle its traffic load today. In addition, the sharp curves of the bridge approaches impede the vision of motorists and slow down the flow of traffic. The Railroad has posted signs on the bridge limiting speed of six miles per hour; although the speed limit on the county highways is twenty-five miles per hour. The same signs forbid any vehicle weighing more than ten tons with its load to cross the bridge. This excluded some 23% of the commercial traffic in New Jersey.

At present there is no paint or protective covering on the steel portions of the bridge and they have corroded. The rivet heads have become badly pitted. Vital sections of the bridge have been damaged by collisions. The steel produced in 1901 when the bridge was built was inferior to present-day quality and there is reason to suspect "fatigue" in the bridge itself. The compression flanges are badly damaged. It can only carry a ten ton load. Testimony by

a railroad expert that the bridge has a greater load capacity is rebutted completely by the fact that the Railroad itself posted signs on the bridge limiting loads to 10 tons. As a result of these many factors, the safety of the bridge was called into serious question.

The Railroad does not attack the conclusion of the New Jersey Supreme Court that, "The improvement here involved is necessary to meet local transportation needs reflecting the growth of the community" (JS 1a).

ARGUMENT

The judgment of the New Jersey Supreme Court presents no constitutional question of substance warranting further argument in this court.

Initially, it should be observed that the Railroad failed to raise its constitutional issue at a timely point in these proceedings. The constitutional question was not argued before the Board of Public Utility Commissioners. The Appellate Division of the New Jersey Superior Court observed:

> "We think a foundation for the presentation of the (constitutional) point is scarcely raised in defendant's brief or in its 'statement of questions involved' therein, R.R. 1:7-1(e), but the question was orally argued and we will deal with it" (JS 27a)

The New Jersey Supreme Court observed that the Railroad was shifting its constitutional issue from the argument it presented to the Appellate Division (JS 2a). Under these circumstances, it is submitted that the constitutional challenge raised by the Railroad should not be considered in this Court. Familiar principles of orderly procedure indicate that a constitutional challenge must be interposed at the first opportunity.

The Deep Cut Bridge was built originally because the Railroad decided to cross the Washington Road and wished to avoid a crossing at grade. It was built by the Railroad for the convenience of the Railroad. Designed for a sparsely settled rural area, it can not accommodate its present traffic load because of the growth of local community. Although it met the standards of its day when built, today it threatens the safety of its users.

This Court has held on numberous occasions that a State can constitutionally compel a railroad at its own expense to construct a crossing bridge under these circumstances. *Atchison, Topeka & S. F. R. Co.* v. *P. U. C.* 346 U. S. 346, 352, 74 S. Ct. 92, 96, 98 L. Ed. 51 (1953); *Erie R. R. Co.* v. *Bd. of Pub. Utility Commrs.*, 254 U. S. 394, 41 S. Ct. 169, 65 L. Ed. 322 (1921); *Chicago M. & St. P. Ry. Co.* v. *Minneapolis*, 232 U. S. 430, 34 S. Ct. 400, 58 L. Ed. 671 (1914). In the *Atchison* case, the improvements were instituted to meet local transportation needs and further safety and convenience made necessary by rapid growth in the area. These circumstances are exactly as we find them in the present case. The Court said:

> "In such circumstances this Court has consistently held that in the exercise of the police power the costs of such improvements may be allocated all to the railroad." *Atchison, Topeka & S. F. R. Co.* v. *P. U. C.*, *supra*, 346 U. S. at 352, 74 S. Ct. at 96.

Nor does *Nashville, C. & St. L. Ry.* v. *Walters*, 294, U. S. 405, 55 S. Ct. 486, 79 L. Ed. 949 (1935) indicate otherwise. Appellant contends that this case holds that a statute which requires a railroad to pay the same percentage of crossing costs under all circumstances is unconstitutional on its face. The case does not so hold. *Nashville* held that the proper test of constitutionality is

whether the statute is arbitrary and unreasonable as applied to the facts of the particular case. In *Nashville* the Court recognized that it was reasonable to lay the entire crossing costs on the railroad where—as in the present case—the expense "was an incident of the growth or development of the municipality in which it was located." *Nashville, C. & St. L. Ry.* v. *Walters, supra* 294 U. S. at 430, 55 S. Ct. at 495. The unusual circumstance in Nashville that prompted a finding of arbitrariness was that the new grade crossing there involved was not needed by the rural Tennessee community where it was located; the need to build a new crossing arose solely from the construction of a State superhighway with federal funds to link Nashville and Memphis, which was to serve as a link in a national highway system designed for use by motor carriers, competitors of the railroads. The United States Supreme Court held that the Tennessee Supreme Court was arbitrary in refusing under these circumstances even to consider whether the local statute was fair and reasonable. The Tennessee law was not overturned; the court simply remanded the case to the Tennessee Supreme Court so that it might consider whether the application of the statute was arbitrary as applied to the particular facts presented.

The New Jersey Supreme Court in the present case did exactly what this honorable Court directed should be done in the *Nashville* case. The majority opinion carefully considered whether the statute is reasonable as applied to the particular facts presented. The Court held:

> "The Legislature cannot always anticipate the constitutional formula which may be judicially devised and perhaps revised with changing circumstances. There is no reason to insist upon perfect anticipation. If a statute is reasonably appropriate in its overall approach, it should be upheld notwithstanding it may

> be invalid in special circumstances, when it is apparent that the Legislature would want the act to prevail where constitutionally it may. Such surely is the case here. In Nashville it was observed with respect to the very area here involved that 'A statute valid as to one set of facts may be invalid as to another' (294 U. S., at page 415, 55 S. Ct. at page 488). Since appellant does not claim, and surely has not demonstrated, that the act is invalid in its application to the facts of this case, the constitutional challenge must fail." (JS 2a, 3a)

The contention that New Jersey has an inflexible apportionment rule in all cases for all circumstances is patently untrue; the cost that the Railroad bears varies depending upon whether the Garden State Parkway (N.J.S. 27:12B-6), New Jersey Turnpike (N.J.S. 27:23-7), other state highway (N.J.S. 48:12-70), or local road is involved; it also depends upon whether the elimination of a grade crossing (N.J.S. 48:12-62) or reconstruction of a crossing other than at grade (N.J.S. 48:12-49) is being considered. In New Jersey the determination of a fair and reasonable apportionment under differing circumstances has been made by the Legislature rather than delegated to the discretion of the Board of Public Utility Commissioners.